Filed
December 1, 1994
Shirley Forrest, Clerk
Court of Appeals
Ninth District
Beaumont, Texas

In The

COURT OF APPEALS

Ninth District of Texas at Beaumont

NO. 09-93-018-CV

SARAH RENAE M. WALTON, Appellant

V.

BILLY L. LEE, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Cause No. 92-01-00153-CV

Appendix A

OPINION

Sarah Renae M. Walton filed a suit to partition military retirement benefits which were not divided in her 1976 divorce from Billy L. Lee. Lee moved for summary judgment on the grounds that as a matter of law the court could not partition military benefits if the divorce decree was issued before June 25, 1981, and failed to treat the benefits in the initial decree. The court granted Lee's motion and entered a summary judgment from which Walton appeals with two points of error.

Point of error one contends the trial court erred in granting summary judgment. The pertinent dates are:

January 7, 1959	Lee enlists in Air Force
August 3, 1961	Lee and Walton wed
November 4, 1976	Lee and Walton divorce
December 15, 1976	*Cearley v. Cearley*[1] *decided*
June 26, 198	*McCarty v. McCarty*[2] decided
July 31, 1981	Lee retires from Air Force

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1 544 S.W. 2d 661 (Tex. 1976).

2 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981).

February 1, 1983	10 U.S.C. § 1408 (1983)[3]("USFSPA") effective
November 5, 1990	10 U.S.C. § 1408(c)(1) (Supp. 1994) enacted
January 21, 1992	Walton files partition suit

In *Cearley*, the Texas Supreme Court settled a split of authority between the Courts of Appeals by holding that unvested military retirement benefits constituted a contingent interest in property and a community interest subject to division upon divorce. In *McCarty*, the United States Supreme Court held that military retirement benefits were a personal entitlement to which the state courts could not apply community property laws. Congress legislatively overruled *McCarty* by enacting 10 U.S.C. § 1408, which provided: "Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such

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[3] The Uniformed Services Former Spouses Protection Act

court." Congress amended this section in 1990, adding the following:

> A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of he member as property of the member and the member's spouse or former spouse.

Upon entry of a divorce decree the former spouses hold any undivided community property as tenants in common. *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970). In cases where the divorce decree was entered prior to November 1, 1987,[4] the commonly held property is divisible through suit for partition governed by the rules applicable to civil cases generally. *Templet v. Templet*, 728 S.W.2d 844

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[4] The effective date of TEX. FAM. CODE ANN §3.90-3.92 (Vernon 1993).

(Tex. App. -- Beaumont 1987, no writ). We hold that under Texas law the courts automatically "treat (or reserve jurisdiction to treat) any amount of retired pay of the member" by virtue of the laws governing ownership of undivided property, and subsequent partition is not precluded by federal law. We are aware that a similar argument was addressed and rejected in *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. -- Tyler 1991, no writ). Point of error one is sustained. We decline to address the constitutional error presented by point of error two. We reverse the judgment and remand this case to the trial court.

REVERSED AND REMANDED.

s/ Don Burgess
DON BURGESS
Justice

Submitted on September 22, 1994
Opinion Delivered December 1, 1994
Publish

Before Walker, C.J., Brookshire and Burgess, JJ.

DISSENT

The majority opinion is inapposite to 10 U.S.C.A. § 1408(c)(1). Our appellee and appellant were divorced prior to June 25, 1981 (November 4, 1976). The United States Congress said "A Court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse." (emphasis mine).

Our trial court did not "treat" (or reserve jurisdiction to treat) the military retirement subject matter. To hold that Texas Courts do so automatically, is a fiction which files in

the face of the preemptive nature of Section 1408(c)(1). See *Knowles v. Knowles*, 811 S.W.2d 709 (Tex. App. – Tyler 1991, no writ). Thus, I respectfully file this dissent.

s/ Ronald L. Walker
RONALD L. WALKER
Chief Justice

Dissent Delivered
December 1, 1994
Publish

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 310
Beaumont, Texas 77701

Judgment entered December 1, 1994

Sarah Renae M. Walton

vs No. 09-93-018 CV

Billy L. Lee

Appealed from the 9th District Court of Montgomery County

Opinion by Justice Don Burgess

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be reversed and the cause remanded to the trial court. REVERSED AND REMANDED. A copy of this judgment shall be certified below for observation.

Appendix B

A true copy of this judgment, to be entered, I hereby certify.

s/ Shirley Forrest
Shirley Forrest,
Clerk

Denied and overruled
Dec. 21, 1994

CJB DB

Filed
December 16, 1994
Shirley Forrest,
Clerk
Court of Appeals
Ninth Distirct
Beaumont, Texas

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-93-018 CV

SARAH RENEA M. WALTON, Appellant

V.

BILLY L. LEE, Appellee

On Appeal from the 9th District Court
Montgomery County, Texas
Cause No. 92-01-00153-CV

MOTION FOR REHEARING

Appendix C

BILLY L. LEE, Appellee in this cause, makes this motion for a rehearing of the judgment of the Court rendered on December 1, 1994, as shows:

I.

POINT OF ERROR

The court of appeals erred in reversing the trial court's judgment and remanding the cause to the trial court on the basis that the trial court erred in granting Appellee's Motion for Summary Judgment by holding that "the courts automatically 'treat

IN THE SUPREME COURT OF TEXAS

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March 30, 1995

NO. 95-0087	)
	)
BILLY L. LEE	)
	)
v.	) From MONTGOMERY
	) County, 9th District
	)
SARAH RENAE M. WALTON	)

Application of petitioner for writ of error to the Court of Appeals for the Ninth District having been duly considered, and the Court having determined that the application presents no error of law which is of such importance to the jurisprudence of the State as to require correction, or reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, denied.

It is further ordered that applicant, Billy L. Lee, pay all costs incurred on this application.

****

Appendix D

NO. 95-0087) April 27, 1995
)
BILLY L. LEE)
)
v.)From MONTGOMERY
)County, 9th District
)
SARAH RENAE M. WALTON)

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

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UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A--GENERAL MILITARY LAW
PART II--PERSONNEL
CHAPTER 71--COMPUTATION OF RETIRED PAY

Current through P.L. 104-3, approved 3-7-95

Sec. 1408. Payment of retired or retainer pay in compliance with court orders

(a) Definitions.--In this section:

(1) The term "Court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction; and

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such

previously issued decree), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver

of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

[(E) and (F) Redesignated (C) and (D)]

(5) The term "member" includes a former member entitled to retired pay under section 1331 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

(b) Effective service of process.--For the purposes of this section--

(1) service of a court order is effective if--

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (i) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by

certified or registered mail, return receipt requested;

(B) the court order is regular on its face;

(C) the court order or other documents served with the court order identify the member concerned and include, if possible, the social security number of such member; and

(D) the court order or other documents served with the court order certify that the rights of the member under the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C.App. 501 et seq.) were observed; and

(2) a court order is regular on its face if the order--

(A) is issued by a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's

spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

(d) Payments by secretary concerned to spouse or former spouse.--(1) After effective service on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or

a former spouse of the member, the Secretary shall make payments (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse in an amount sufficient to satisfy the amount of child support and alimony set forth in the court order and, with respect to a division of property, in the amount of disposable retired pay specifically provided for in the court order. In the case of a member entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date of effective service. In the case of a member not entitled to receive retired pay on the date of the effective service of the court order, such payments shall begin not later than 90 days after the date on which the member first becomes entitled to receive retired pay.

(2) If the spouse or former spouse to whom payments are to be made under this section was not married to the member for a period of 10 years or more during which the member performed at least 10 years of service creditable in determining the member's eligibility for retired pay, payments may not be made under this section to the extent that they include an amount resulting from the treatment by the court under subsection (c) of disposable retired pay of the member as property of the member or property of the member and his spouse.

(3) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with a court order.

(4) Payments from the disposable retired pay of a member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(5) If a court order described in paragraph (1) provides for a division of property (including a division of community property) in addition to an amount of child support or alimony or the payment of an amount of disposable retired pay as the result of the court's treatment of such pay under subsection (c) as property of the member and his spouse, the Secretary concerned shall pay (subject to the limitations of this section) from the disposable retired pay of the member to the spouse or former spouse of the member, any part of the amount payable to the spouse or former spouse under the division of property upon effective service of a final court order of garnishment of such amount from such retired pay.

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of

disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired, pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month

pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-serve basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with

respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under

section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

(f) Immunity of officers and employees of United States.--(1) The United States and any officer or employee of the United States shall not be liable with respect to any payment made from retired pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (i).

(2) An officer or employee of the United States who, under regulations prescribed pursuant to subsection (i), has the duty to respond to interrogatories shall not be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Notice to member of service of court order on secretary concerned.--A person receiving effective service of a court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy of such order) to the member affected by the court order at his last known address.

(h) Benefits for dependents who are victims of abuse by members losing right to retired pay.--(1) If, in the case of a member or former member of the armed forces referred to in paragraph (2)(A), a court order provides (in the manner applicable to a division of property) for

the payment of an amount from the disposable retired pay of that member or former member (as certified under paragraph (4)) to an eligible spouse or former spouse of that member or former member, the Secretary concerned, beginning upon effective service of such court order, shall pay that amount in accordance with this subsection to such spouse or former spouse.

(2) A spouse or former spouse of a member or former member of the armed forces is eligible to receive payment under this subsection if--

(A) the member or former member, while a member of the armed forces and after becoming eligible to be retired from the armed forces on the basis of years of service, has eligibility to receive retired pay terminated as a result of misconduct while a member involving abuse of a spouse or dependent child (as defined in regulations prescribed by the Secretary of Defense or, for the Coast Guard when it is not operating as a service in the Navy, by the Secretary of Transportation); and

(B) the spouse or former spouse--

(i) was the victim of the abuse and was married to the member or former member at the time of that abuse; or

(ii) is a natural or adopted parent of a dependent child of the member or former member who was the victim of the abuse.

(3) The amount certified by the Secretary concerned under paragraph (4) with respect to a member or former member of the armed forces referred to in paragraph (2)(A) shall be deemed to be the disposable retired pay of that member or former member for the purposes of this subsection.

(4) Upon the request of a court or an eligible spouse or former spouse of a member or former member of the armed forces referred to in paragraph (2)(A) in connection with a civil action for the issuance of a court order in the case of that member or former member, the Secretary concerned shall determine and certify the amount of the monthly retired pay that the member or former member would have been entitled to receive as of the date of the certification--

(A) if the member or former member's eligibility for retired pay had not been terminated as described in paragraph (2)(A); and

(B) if, in the case of a member or former member not in receipt of retired pay immediately before that termination of eligibility for retired pay, the member or former member had retired on the effective date of that termination of eligibility.

(5) A court order under this subsection may provide that whenever retired pay is increased under section 1401a of this title (or any other provision of law), the amount payable under the court order to the spouse or former spouse of a member or former member described in paragraph (2)(A) shall be increased at the same time by the percent by which the retired pay of the member or former member would have been increased if the member or former member were receiving retired pay.

(6) Notwithstanding any other provision of law, a member or former member of the armed forces referred to in paragraph (2)(A) shall have no ownership interest in, or claim against, any amount payable under this section to a spouse or former spouse of the member or former member.

(7)(A) If a former spouse receiving payments under this subsection with

respect to a member or former member referred to in paragraph (2)(A) marries again after such payments begin, the eligibility of the former spouse to receive further payments under this subsection shall terminate on the date of such marriage.

(B) A person's eligibility to receive payments under this subsection that is terminated under subparagraph (A) by reason of remarriage shall be resumed in the event of the termination of that marriage by the death of that person's spouse or by annulment or divorce. The resumption of payments shall begin as of the first day of the month in which that marriage is so terminated. The monthly amount of the payments shall be the amount that would have been paid if the continuity of the payments had not been interrupted by the marriage.

(8) Payments in accordance with this subsection shall be made out of funds in the Department of Defense Military Retirement Fund established by section 1461 of this title or, in the case of the Coast Guard, out of funds appropriated to the Department of Transportation for payment of retired pay for the Coast Guard.

(9)(A) A spouse or former spouse of a member or former member of the armed forces referred to paragraph (2)(A), while receiving payments in accordance with this subsection, shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to receive any other benefit that a spouse or a former spouse of a retired member of the armed forces is entitled to receive on the basis of being a spouse or former spouse, as the case may be, of a retired member of the armed forces in the same manner as if the

member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(B) A dependent child of a member or former member referred to in paragraph (2)(A) who was a member of the household of the member or former member at the time of the misconduct described in paragraph (2)(A) shall be entitled to receive medical and dental care, to use commissary and exchange stores, and to have other benefits provided to dependents of retired members of the armed forces in the same manner as if the member or former member referred to in paragraph (2)(A) was entitled to retired pay.

(C) If a spouse or former spouse or a dependent child eligible or entitled to receive a particular benefit under this paragraph is eligible or entitled to receive that benefit under another provision of law, the eligibility or entitlement of that spouse or former spouse or dependent child to such benefit shall be determined under such other provisions of law instead of this paragraph.

(10)(A) For purposes of this subsection, in the case of a member of the armed forces who has been sentenced by a court-martial to receive a punishment that will terminate the eligibility of that member to receive retired pay if executed, the eligibility of that member to receive retired pay may, as determined by the Secretary concerned, be considered terminated effective upon the approval of that sentence by the person acting under section 860(c) of this title (article 60(c) of the Uniform Code of Military Justice).

(B) If each form of the punishment that would result in the termination of

eligibility to receive retired pay is later remitted, set aside, or mitigated to a punishment that does not result in the termination of that eligibility, a payment of benefits to the eligible recipient under this subsection that is based on the punishment so vacated, set aside, or mitigated shall cease. The cessation of payments shall be effective as of the first day of the first month following the month in which the Secretary concerned notifies the recipient of such benefits in writing that payment of the benefits will cease. The recipient may not be required to repay the benefits received before that effective date (except to the extent necessary to recoup any amount that was erroneous when paid).

(11) In this subsection, the term "dependent child", with respect to a member or former member of the armed forces referred to in paragraph (2)(A), means an unmarried legitimate child, including an adopted child or a stepchild of the member of former member, who--

(A) is under 18 years of age;

(B) is incapable of self-support because of a mental or physical incapacity that existed before becoming 18 years of age and is dependent on the member or former member for over one-half of the child's support; or

(C) if enrolled in a full-time course of study in an institution of higher education recognized by the Secretary of Defense for the purposes of this subparagraph, is under 23 years of age and is dependent on the member or former member for over one-half of the child's support.

(i) Regulations.--The Secretaries concerned shall prescribe uniform

regulations for the administration of this section.

NO. 92-01-00153-CV

IN THE MATTER OF THE MARRIAGE OF	§IN THE DISTRICT § COURT OF §
	§MONTGOMERY COUNTY, § TEXAS
SARAH RENAE M. WALTON AND BILLY L. LEE	§ §9TH/2ND9TH JUDICIAL § DISTRICT

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT;

COMES NOW BILLY L. LEE, Respondent, and moves for Summary Judgment against Petitioner, SARAH RENAE M. WALTON, and in support thereof, would respectfully show unto the Court:

I.

There are no issues as to any material facts. For the purposes of this motion, Respondent accepts as true that a portion of Petitioner's pleading setting forth the chronological events of marriage and divorce.

II.

The facts of this case are undisputed. On January 7, 1959, Respondent enlisted in the military service, and served until July 31, 1981, the date of his retirement and discharge from military service. Subsequently, he and Petitioner were married on August 3, 1961. The parties were divorced on November 4, 1976. On or about July 31, 1981, Respondent retired from military service. Then, on January 2, 1992, SARAH RENAE M. WALTON, Petitioner, filed the instant cause of action seeking a division or partition of military benefits. It is further undisputed that the divorce decree that was granted on November 4, 1976, in the District Court of Montgomery County, Texas, was issued before June 25, 1981, and did not treat (or reserve jurisdiction to treat) any amount of retired pay of the

member as property of the member and the member-spouse or former spouse.

III.

In support of this motion, Respondent relies on pleadings on file in this cause and the affidavit of BILLY L. LEE that has been filed with the Court in support of this motion. A certified copy of the divorce decree granted on November 4, 1976 is attached hereto and incorporated herein the same as if copied herein verbatim.

IV.

The law is clear and now unequivocable that a Court may not divide or partition military benefits if the initial divorce decree was issued before June 25, 1981, and failed to treat or deal with the military retirements in the initial divorce decree. Respondent is, therefore, entitled to summary judgment as a matter of law.

WHEREFORE, Respondent requests that this matter be set for hearing, with notice to Petitioner, and that upon completion of the hearing, the Court enter judgment that Petitioner take nothing and Respondent recover costs from Petitioner and for such other and further relief to which Respondent is entitled.

Respectfully submitted,

s\ John L. Oxley
JOHN L. OXLEY
Attorney for Respondent
P. O. Box 158
Madisonville, Texas 77864
(409)348-2601
SBOT#15392500

NO. 92-01-00153-CV

IN THE MATTER OF THE MARRIAGE OF	§	IN THE DISTRICT COURT OF
	§	MONTGOMERY COUNTY, TEXAS
SARAH RENAE M. WALTON AND BILLY L. LEE	§	9TH/2ND9TH JUDICIAL DISTRICT

FINAL SUMMARY JUDGMENT

On November 10, 1992, the Court heard the motion for summary judgment filed in this cause by BILLY L. LEE, Respondent. All parties appeared by and through their respective counsel. The Court, after examining the pleadings and the summary judgment evidence and hearing the arguments of counsel, is of the opinion and finds that BILLY L. LEE is entitled to summary judgment as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Petitioner, SARAH RENAE M. WALTON, take nothing against

Respondent, BILLY L. LEE, and that Respondent recover all costs in his behalf expended of and from Petitioner, for which let execution issue.

All relief requested and not expressly granted is denied.

SIGNED this 11th day of December, 1992.

s/ Jim Keeshan
JUDGE PRESIDING

APPROVED AS TO FORM:

s/ John L. Oxley
JOHN L. OXLEY

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